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No. 205.

Brief of Stevenson for P. E.

IN THE

SUPREME COURT

Filed Sept. 22, 1900.

OF THE UNITED STATES.

OCTOBER TERM, 1900.

EDWARD C. BAGGS, AS RECEIVER OF THE DENVER CITY RAILROAD COMPANY,
Plaintiff in Error,

vs.

ALBERT G. MARTIN, HARRY D. MARTIN, AND HERMAN H. MARTIN,
Defendants in Error.

No. 205.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PLAINTIFF IN ERROR ON QUESTIONS SUBMITTED BY THE HONORABLE JUDGES OF THE CIRCUIT COURT OF APPEALS.

A. M. STEVENSON,
Counsel for Plaintiff in Error.

THE SMITH-BROOKS PRINTING CO., DENVER.

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STATEMENT OF CASE.

This case is here on a certificate of the honorable judges of the United States Court of Appeals for the

Eighth Circuit, asking the instructions of this honorable court in answer to questions propounded by the judges of the Circuit Court of Appeals.

The facts disclosed by the record are correctly stated in the certificate, but for convenience, will briefly be repeated here:

On the first day of July, 1898, the Central Trust Company, a New York corporation, commenced an action in the Circuit Court of the United States for the District of Colorado against The Denver City Railroad Company, a Colorado corporation, for the foreclosure of a mortgage given by the railroad company to the trust company in trust for the benefit of the bondholders—beneficiaries of the mortgage.

On the same day the plaintiff in error was appointed receiver of the property of the railroad company and immediately took possession of the property and entered upon the discharge of his duties as such receiver. On the 5th day of August, 1898, while the receiver was operating the railroad within the city of Denver, Mary E. Martin, the mother of the defendants in error, received injuries in alighting from one of the cars of the railroad company on account of which she died August 7, 1898.

On the 30th day of August, 1898, the defendants in error, sons of the deceased, commenced an action in the District Court of Arapahoe county, Colorado, against the receiver, alleging, in substance, that the death of their mother was occasioned by the fault and negligence of the employes of the receiver, and claiming damages against the receiver, in accordance with the laws of the state of Colorado, in the sum of $5,000.

On September 19, 1898, the receiver presented his petition and bond to the District Court of Arapahoe county for the removal of the cause from that court to the Circuit Court of the United States for the District of Colorado for the sole reason "that said action (the one sought to be removed) is one arising under the laws of the United States and is ancillary to said action and proceeding in the said Circuit Court of the United States for the District of Colorado wherein the said Central Trust Company of New York is complainant and the said Denver City Railroad Company is defendant."

On September 21, 1898, the District Court of Arapahoe county duly entered an order granting the prayer of said petition, removing said cause to the Circuit Court.

On July 12, 1899, the case was tried in the Circuit Court and a judgment recovered against the receiver in the sum of $3,000.

On July 18, 1899, the record in said cause was removed by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, where the case still remains undecided.

The questions upon which the honorable judges of the United States Circuit Court of Appeals for the Eighth Circuit request the instructions of this honorable court are as follows:

First—In view of the provisions contained in section 3 of the judiciary act approved on March 3, 1887 (25 Stat., c. 866, p. 436), permitting receivers, appointed by any court of the United States, to be sued in respect of any act or transaction of his in carrying on the business connected with such prop-

erty, without the previous leave of the court in which such receiver is appointed, was it competent for said Edward C. Baggs, as receiver of The Denver City Railroad Company, to remove said cause from the District Court of Arapahoe county, wherein he was sued, to the Circuit Court of the United States for the District of Colorado?

Second—Did said Circuit Court for the District of Colorado, by virtue of the aforesaid removal, acquire lawful jurisdiction of said cause and power to render the aforesaid judgment therein?

BRIEF AND ARGUMENT.

Until the passage of the act of March 3, 1887, the rule has been well settled in the federal courts that a receiver could not be sued without the consent of the court of equity which appointed him. This rule, in all its fullness and completeness, has been extended to actions against receivers on a money demand or for damages.

Barton vs. Barbour, 104 U. S., 126.

And on the authority of the above case it was said by Mr. Circuit Judge Pardee, "That the necessity of obtaining leave to prosecute a suit against a receiver appointed by another court is jurisdictional."

Mo. Pac. Ry. Co. vs. Texas Pac. Ry. Co.,
41 Fed., 311.

The rule announced by the Supreme Court was to a great extent abrogated by section 3 of the

act of March 3, 1887, which provided that "Every receiver or manager of any property, appointed by any court of the United States, may be sued in respect to any act or transaction of his in carrrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice."

25 U. S. Stats., 433, section 3.

It will, we assume, be conceded that prior to the passage of the act of 1887, when leave of court had been obtained, and after the passage of that act, without leave of court, the federal and state courts had concurrent jurisdiction in actions against receivers for damages on account of personal injuries occasioned by the negligence of their employes.

At the time the defendants in error commenced this action in the state court it was not necessary to obtain leave of the federal court appointing the receiver in order to commence or prosecute the action.

The action was commenced in the state court and the jurisdiction of the state court having attached, its jurisdiction is exclusive and could not be taken away until the litigation was settled without the receiver, plaintiff in error, had a right to have the cause removed to the federal court.

The high court of chancery of Maryland states the rule as follows:

"When two courts have concurrent jurisdiction over the same subject matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres and over the same subjects and persons. * * * Any other rule will unavoidably lead to perpetual collision and be productive of the most calamitous results."

Brooks vs. Delaplaine, 1 Md. Chan., 354.

This court has declared, speaking by Mr. Justice Swayn, that

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is, unless there is some provision to the contrary, exclusive in effect until it has wrought its function."

Taylor vs. Taintor, 16 Wall, 370.

For an able discussion of the relative rights and duties of courts in cases of possible conflict of juris-

diction, attention is called to the opinion of the learned Mr. Justice Field in Sharon vs. Terry, 36 Fed., pages 354 to 360, and the cases cited in that opinion.

See also:

Harkrader vs. Wadley, 172 U. S., 148, and
Trust Co. vs. East Tenn. V. & G. Ry. Co.,
19 Fed., 523, and cases cited.

The state court then, having first obtained jurisdiction of the parties and subject matter of the controversy, was entitled to retain such jurisdiction to the exclusion of the federal courts unless the case is one "arising under the Constitution or laws of the United States."

From an examination of the decisions of the federal courts construing section 3 of the act of 1887, the necessity for a proper construction of that section of the judicial act and the wisdom of asking the instructions of this court concerning the same is apparent.

Commencing with the earliest consideration of the act, we find an entire lack of harmony in the opinions of the various courts and judges who have attempted to arrive at the intention of congress in its passage. Beginning with the opinion of District Judge McCormick of the northern district of Texas, who refused to remand a case brought in the state court against a receiver and removed to the federal court for the doubtful reason that on account of the unsettled condition of judicial opinion concerning the act, a federal question was presented (Evans vs.

Dillingham, 43 Fed., 179), down to a decision of the Circuit Court of Appeals, March, 1900 (Gableman vs. Peoria, etc., Ry. Co., 101 Fed., 1), there are scarcely two of the judges who give the same or like reasons for their conclusions.

We now direct the court's attention to the numerous decisions construing this act and it will be found that there are almost as many reasons assigned for the conclusions of the courts as there are opinions construing the act.

Shortly after the passage of the act of 1887 the Circuit Court for the northern district of Texas refused to remand a cause against a receiver to the state court for the doubtful reason that because of the unsettled state of judicial opinion concerning the act of 1887 a federal question was presented, thus giving the federal courts jurisdiction, the district judge observing that "it is urged by defendant's counsel with certainly some apparent force, that it is immaterial what is the sound construction of the act of 1887 affecting this case; that the fact that it must be construed in order to determine the plaintiff's right to sue presents such a federal question as authorizes the removal. Whether this view be sound or not, it seems to me that in the as yet unsettled state of judicial opinion as to the correct construction of the provisions of the act of 1887 on this subject the petition for removal does present a federal question which the defendant is entitled to have passed on by the United States Court." * * *

Evans et al. vs. Dillingham et al., 43 Fed., 179.

Circuit Judges Lurton and Taft and perhaps others were first of the opinion that the intent of congress was only to permit suits in the courts *having jurisdiction of the property and the receiver* and Judge Lurton observed "This would secure to the suitor the right of jury trial according to the usual course of the court where the demand was of legal character. At the same time such judgment would have been subject to the equitable jurisdiction of the court and be given its proper rank in the distribution of the property."

He says that, entertaining these views, Judge Taft and himself felt justified in issuing injunctions against suits in courts of other jurisdiction.

These opinions they entertained until after the decision of this court in McNulty vs. Lochridge, 141 U. S., 327, and Ry. Co. vs. Johnson, 151 U. S., 81.

Judge Lurton also states that the construction placed upon the act by Judge Taft and himself was not presented to this court at the time they passed upon the two cases last cited. He seemed, however, to take it for granted that a suit against a receiver appointed by federal court is one arising under the Constitution and laws of the United States and says:

> "The right of the receivers to remove any suit brought in the state court where the sum involved is $2,000, seems to be unaffected by the act of 1887."
>
> Trust Co. vs. E. Tenn. V. & G. Ry. Co., 59 Fed., 523.

In April, 1896, Judge Taft, Circuit Court Kentucky, in Landes vs. Felton, 73 Fed., 311, decides that

"An action brought without leave of court against a receiver appointed by federal court and other parties who are citizens of the same state as plaintiff to establish a joint liability of all the defendants is a suit arising under the laws and Constitution of the United States, and if originally brought in the state court may be removed to a federal court."

In July, 1896, Judge Hallett (Circuit Court of Colorado) refused to follow Landes vs. Felton and held that where the receiver was joined with another party who would not have the right of removal, that the receiver could not remove the action from the state to the federal court.

Shearing vs. Trumbull et al., 75 Fed., 33.

Again, in July, 1896, Judge Hanford (Circuit Court of Washington) refused to remand a case brought by the state of Washington against receivers of The Northern Pacific Railway Company and removed from the state to the federal court, not because that a suit against a receiver was one arising under the Constitution or laws of the United States, but for what seems to be a much better reason, namely, that in the case passed upon by Judge Hanford there was an attempt to interfere with the receiver in his official capacity and to regulate and affect the operation and business of the railroad.

State of Washington vs. Nor. Pac. Ry. Co. et al., 75 Fed., 333.

District Judge McHugh (Circuit Court of Nebraska) decided that a suit brought in the state court against receivers without leave was one arising under the laws of the United States and might be removed to the federal court. There was, however, in the case decided by Judge McHugh, another and sufficient reason for the removal of the case from the state court: it was an action against the receivers of the Union Pacific Railway Company et al., and as that company was organized under the laws of the United States, on the authority of the Pacific Railway Removal Cases, 115 U. S., 1, the receivers were clearly entitled to have the case against them tried in the federal court.

Lund vs. U. P. Ry. Co. et al., 78 Fed., 385.

July 14, 1897, District Judge Baker (Circuit Court of Indiana) held that in a suit against a receiver, if the amount in controversy exceeded $2,000, the case was one subject to removal to the federal court.

Ray vs. Peirce, 81 Fed., 881.

A like decision of Judge Baker is found in Gableman vs. Peoria D. & E. R. R. Co. et al., 82 Fed., 791. This decision was afterwards reversed by the Circuit Court of Appeals.

Gableman vs. Ry. Co., 101 Fed., 1.

July 17, 1897, District Judge Phillips (Circuit Court of Missouri), following a decision of District Judge Hanford, Circuit Court of Washington (Carpenter vs. Nor. Pac. Ry. Co., 75 Fed., 850), held that

a case against a receiver brought in the state court without leave was subject to removal regardless of the amount in controversy—thus, it would seem, failing to give any effect whatever to the act of 1887.

Sullivan vs. Bernard, 81 Fed., 886.

District Judge Thompson (Circuit Court of Ohio), while holding if the amount involved exceeds $2,000, a suit brought in the state court against a receiver of the federal court may be removed, remands the case before him for the reason that the amount involved was less than $2,000, and says that such suits are not ancillary to the main suit in which the receiver was appointed.

Pitkin vs. Cowan et al., 91 Fed., 600.

And in 93 Fed. Judge Taft takes the same view as Judge Thompson in the case last cited.

Gilmore vs. Herrick et al., 93 Fed., 525.

See, also, on the question of removal of suits by receivers, Plow Works vs. Fink, 26 C. C. A., 49.

District Judge Evans (Circuit Court of Kentucky) holds that "an action against receivers appointed by a federal court is one *per se* arising under the laws of the United States, and when brought in a state court is removable, under the removal acts where the jurisdictional amount is involved, regardless of the citizenship of the parties." "The right of removal in such case is not affected by the provision of the judiciary act (25 Stat., 436) permitting such receiver to be sued in state

courts without first obtaining leave of the court which appointed them."

The decision is based upon a decision of Judge Taft in Gilmore vs. Herrick, 93 Fed., 525, Judge Evans holding that the law in that circuit is settled by Judge Taft's opinion.

Tompkins vs. MacLeod et al., 96 Fed., 927.

Judge Evans, as will be hereafter noted, afterward doubted the correctness of the decisions made by Judge Taft and himself.

102 Fed., 775.

It will thus be seen by an examination of the cases cited that some of the judges were of opinion that section 3 of the act of 1887 only permitted suits to be commenced, without leave, *in the court in which the receiver was appointed;* others held that they might be commenced in any court of proper jurisdiction and removed to the federal court upon application without regard to the amount involved, and for the sole reason that such suits were ancillary to the main suit in which the receiver was appointed while still others declared that such suits were not ancillary to the suit in which receivers were appointed, but were suits of original cognizance, and must, therefore, be tried as independent suits, and that the court appointing the receiver had no power to change the form of the action and that it must be tried in the federal court before a jury as a suit at law.

Still others declare that because the act of congress provided that such suits should be subject to the

general equity jurisdiction of the court appointing the receiver, this gave the federal court the right and duty to determine the rightfulness of the judgment and authority to increase or diminish the amount of the judgment in the same manner that it would have done had the cause been brought in the federal court in the first instance.

Others of the federal courts have held that where judgment was obtained in the state court, the federal court had no right to increase or diminish the amount of the judgment, and was only authorized to determine the time and manner of its payment.

Others have held that the only change made by the act of 1887 was to relieve the plaintiff who brought suit without leave, from the penalty of contempt.

And, finally, the Circuit Court of Appeals, Seventh Circuit (Circuit Judges Woods, Jenkins and Grosscup), declared that an action brought in the state court against the receiver of a railroad company to recover damages for personal injury was not removable as a cause arising under the constitutional laws of the United States.

Gableman vs. Peoria D. & C. Ry. Co., 101 Fed., 1.

A careful reading of the opinions favoring the right of removal seems to indicate that they are based somewhat, if not entirely, on Railway vs. Cox, 145 U. S., 593.

It is true that some of the expressions of the learned chief justice in the above case sustain this po-

sition. The case, however, is clearly distinguishable from the case we are considering, and we do not believe it authority in cases like the one under consideration.

Railway vs. Cox was a case brought by Mrs. Cox, a citizen of Texas, in the United States Circuit Court against the receivers of The Texas & Pacific Railway Company to recover damages for the death of her husband. The receivers were sued in their representative capacity and, in respect to the liability, they stood in the place of the corporation; this case was clearly one arising under the laws of the United States because the corporation was organized under the laws of the United States and derived its right to carry on business and sue and be sued by virtue of such laws.

It was early held that such corporations were entitled, under the act of March 3, 1875, to have suits which had been commenced against them in the state court removed to the federal court.

Pac. Ry. Removal Cases, 115 U. S., 1.

Prior to passage of the act of March 3, 1887, there had been much complaint against the injustice of requiring the citizen to litigate legal demands against receivers appointed by federal courts upon the equity side of tribunals often remote from his residence, thus involving him in unusual expense and depriving him of his constitutional right of trial by jury. This system gave to the insolvent corporation an advantage over both the complaining citizen and its solvent competitor. This advantage was so frequently recognized that Circuit Courts appointing re-

ceivers often made a general order permitting them to be sued without leave, and in this way, as far as possible, under then existing laws tried to remedy the evil. It was against this evil that congress was legislating when it passed section 3 of the act of March 3, 1887.

Upon this question Circuit Judge Caldwell, in Dow vs. Memphis, etc., Ry. Co., says:

> "The general license to sue the receiver is given because it is desirable that the right of the citizen to sue in the local state courts, on the line of the road, should be interfered with as little as possible. It is doubtless convenient, and a saving and protection to the railroad company and its mortgage bondholders to have the litigation growing out of the operation of a long line of railroad concentrated in a single court, and on the equity side of that court, where justice is administered without the intervention of a jury. But in proportion as the railroad and its bondholders profit by such an arrangement, the citizen dealing with the receiver is subjected to inconvenience and expense and he is deprived of the forum and the right of trial by jury, to which, in every other case of legal cognizance, he has the right to appeal for redress. It is not necessary for the accomplishment of the purposes for which receivers of railroads are appointed, to impose such burdens and deprivations on citizens dealing with the receiver; and neither

the railroad company nor its bondholders have any equity to ask it. Where property is in the hands of a receiver simply as a custodian, or for sale or distribution, it is proper that all persons having claims against it, or upon the fund arising from its sale, should be required to assert them in the court appointing the receiver. But a very different question is presented where the court assumed the operation of a railroad hundreds of miles in length, and advertises itself to the world as a common carrier. This brings it into constant and extensive business relations with the public. Out of the thousands of contracts it enters into daily as a common carrier, some are broken and property is damaged and destroyed, and passengers injured and killed by the negligent and tortious acts of its receiver and his agents. In a word, all the liabilities incident to the operation of a railroad are incurred by a court where it engages in that business; and, when they are incurred, why should the citizen be denied the right to establish the justice and amount of his demand, by a verdict of a jury in a court of the county where the cause of action arose and the witnesses reside? If the road was operated by its owners or its creditors, the citizen would have this right; and when it is operated for their benefit by a receiver, why should the right be denied?

"It is said that if suits are allowed to be brought in the courts of common law, the

plaintiffs would probably receive more by the verdict of a jury than would be awarded to them by the master or chancellor, and that to compel the receiver to answer to suits along the entire line of the road, subjects him to inconvenience and entails additional expense on the estate. This is probably true. But why should a court of equity deprive the citizen of his constitutional right of trial by jury and subject him to inconvenience and loss, to make money for a railroad corporation and its bondholders? If the denial of the right to sue can be rested on the ground that it saves money for the corporation and its creditors, why not carry the doctrine one degree further and declare the receiver shall not be liable to the citizen at all for breaches of contract, or any act of malfeasance or misfeasance in his office as receiver? This would be a great saving to the estate. The difference is one of degree and not of principle. When a court, through its receiver, becomes a common carrier, and enters the lists to compete with other common carriers for the carrying trade of the country, it ought not to claim or exercise any special privileges denied to its competitors, and oppressive on the citizen. The court appointing a receiver of a railroad, and those interested in the property, should be content with the same measure of justice that is meted out to all persons and corporations conducting the like business. The court appointing a receiver can not, of course, per-

mit any other jurisdiction to interfere with its possession of the property, or control its administration of the fund; but, in the case of long lines of railroad, the question of the legal liability of its receiver to the demands of the citizen, growing out of the operation of the road, should be remitted to the tribunals that would have jurisdiction if the controversy had arisen between the citizen and the railroad company; giving to the citizen the option of seeking his redress in such tribunals, or in the court appointing the receiver."

Dow vs. Memphis, etc., Railway Co.,
20 Fed., 267.

Speaking of the act of congress of March 3, 1887, Judge Caldwell says:

"This act was intended to correct abuses that had grown up under the old practice, some of which were pointed out before the passage of the act, in the opinion of this court in Dow vs. Railroad Co., 20 Fed., 267. The act abrogates the old rule on the subject of suing receivers. It is no longer unlawful to sue a receiver appointed by a United States court without leave of the court appointing the receiver. The court now has no discretion to say when its receiver may be sued. The act gives the right without condition or qualification. It is a right not to be nullified, evaded or abridged.

No conditions can be imposed on its exercise. The court must give effect to the act. It has no discretion to do anything else."

Trust Co. vs. St. Louis A. & T. Ry. Co., 40 Fed., 427.

And the same learned judge afterwards, in Trust Co. vs. Railway Co., further states:

"It is true the act of congress provides that when the receiver is sued, the 'suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.' This clause of the act establishes no new rule, but is merely declaratory of the previously existing law. The receiver holds the property for the benefit of all persons having any interest in or lien upon it. The road is a unit. Broken into parts, or deprived of its rolling stock, its value would be greatly impaired. Suits, therefore, which seek to deprive the receiver of the possession of the property, and all process, the execution of which would have that effect, are subject to the control of the court appointing the receiver, so far as may be necessary to the ends of justice. The marshaling of the assets, and the orderly distribution of the fund or property according to the rights and equities of the several parties in interest, is not to be interfered with by the judgment or process

of the state court. The judgment of the state court is conclusive as to the amount of the debt, but the time and mode of its payment must be controlled by the court appointing the receiver."

Trust Co. vs. St. Louis A. & T. Ry. Co., 41 Fed., 555.

In Dillingham vs. Hawk, it was said by the Circuit Court of Appeals of the Fifth Circuit:

"The court whose receiver appellant was did not direct the issue on which appellee's judgment was obtained to be tried by a jury, and did not render the judgment thereon. The suit in which the judgment was obtained was not instituted by leave of the court, but was brought as a matter of right,—a right conferred by the act of congress of March 3, 1887, which provides that every receiver appointed by any court of the United States may be sued without previous leave of the court. Prior to that act of congress the rule was that a receiver could not be sued without leave of the court of equity which appointed him. That act abrogates the old rule. The court now has no discretion to say when its receiver may be sued. The act of congress gives the right without condition or qualification. It gives the right to sue the receiver in any court having jurisdiction of the subject matter and of the parties. The counsel for appellant concedes that the act referred

to gave appellee 'an absolute, unqualified and indisputable right of trial by jury, and in the forum of her own selection.' She selected the state court, and the proceeding therein was on a legal claim, and was purely a common law proceeding. It had no element of equitable jurisdiction in it. The suit was to recover damages for a personal injury caused by the negligence of the receiver, or his agents, in operating a railroad as a common carrier. On such cause of action a receiver can be sued in any court of competent jurisdiction."

Central Tr. Co. vs. St. Louis, A. & T. Ry. Co., 40 Fed., 426; 41 Fed., 551.

Dillingham vs. Russell, 73 Texas, 50; 11 S. W., 139.

"* * * But it is said that, while the act of congress grants leave to sue, it expressly provides that 'such suits shall be subject to the general equity jurisdiction of the court in which such receiver was appointed so far as the same shall be necessary to the ends of justice;' and it is contended that this provision of the act precludes any departure from the established chancery practice. It is true that the act does contain such provision. But considering it in the light of, and as in harmony with, the seventh amendment of the Constitution of the United States, we must construe it as applying only to suits which seek to interfere with the receiver's

possession of property, and to process the execution of which would have that effect; any process, whether for the recovery of such property, or for the enforcement and collection of a judgment out of it. These shall be subject to the control of the court appointing the receiver, so far as the ends of justice may require. The time when, and the manner in which, a judgment against the receiver shall be paid; the adjustment of equities between all persons having claims against the property in his hands; the just distribution of the funds according to the rights of the several parties interested in it, all must necessarily be under the control of the court having custody of the property by its receiver, and shall be subject to its general equity jurisdiction. Dillingham vs. Russell, supra. This we think is the true meaning of the statute referred to. We can perceive no other reasonable interpretation of it. Any other interpretation would impute to congress a very useless act."

Dillingham vs. Hawk, 60 Fed., 496-7.

We respectfully call attention to the following from this court, which we believe justify the conclusion that actions of this character do not involve any question under the Constitution or laws of the United States, and that jurisdiction of the federal courts in cases brought in the state courts against receivers appointed by the federal courts must ultimately rest

upon the diversity of citizenship or be of that class of cases where the corporation represented by the receiver is created by the laws of the United States.

Bausman vs. Dixon was a suit brought against the receiver of a railroad company, appointed by the Circuit Court, to recover damages for injuries arising from alleged negligence of said receiver, said suit being brought in a state court and being carried to final judgment in the Supreme Court of the state. Receiver appealed same to the United States Supreme Court, basing appeal on the ground that he had been appointed by a federal court, and that therefore a federal question was involved—that is, that an authority under the laws of the United States was drawn in question.

The court says:

> "We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver the judgment against him amounts to a denial of the validity of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as it appears, in the state Supreme Court, that any right the receiver possessed

as receiver was contested, although on the merits the employment of the plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.

"We have just held in Capital National Bank of Lincoln vs. The First National Bank of Cadiz, 172 U. S., 425, that where the receiver of a national bank was a party defendant in the state courts, contested the issues on a general denial, and set up no claim of a right under federal statutes withdrawing the case from the application of general law, this court had no jurisdiction to revise the judgment of the highest court of the state resting thereon; and, certainly, an officer of the Circuit Court stands on no higher ground than an officer of the United States.

"Defendant did not deny that he was amenable to suit in the state courts; he did not claim immunity as receiver from suit without previous leave of the Circuit Court, and could not have done so in view of the act of March 3, 1887, c. 373, 24 Stat., 552; all the

questions involved were questions of general law, including the inquiry whether one person holding the office of receiver could be held responsible for the acts of his predecessor in the same office; * * *

"Section three of the act of March 3, 1887, provides that: 'Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.' It is not denied that this action was prosecuted and this judgment rendered in accordance therewith."

Bausman vs. Dixon, 173 U. S., 113 (114-115).

Pope vs. Railway Company is an action brought in the Circuit Court for the District of Indiana, by a receiver appointed by the Circuit Courts for the Districts of Illinois and Indiana, to recover certain property claimed to be owned by the corporation of which he was receiver in possession of citizens of states other than the one of which he or the corporation were citizens. Judgment for receiver was appealed to Circuit Court of Appeals, which reversed the decree of Circuit Court and ordered the bill dismissed. Case appealed to Supreme Court.

The court holds that the Circuit Court of Appeals had jurisdiction to order the case dismissed, as it was one ancillary to the suits in which the receiver was appointed, and in these latter suits the Circuit Court had unquestioned jurisdiction on the ground of diverse citizenship; but the court adds "some further observations" in regard to the jurisdiction of the Circuit Court in the suit to recover this property, as follows:

> "The receiver based his right of recovery on the alleged seizure by one of the defendant companies of certain rights of way, and grading done thereon by the Atlantic Company under two specified contracts, which seizure and appropriation were alleged to have been fraudulently and forcibly made; and it was averred that appellee, The Louisville, New Albany & Chicago Railroad Company, acquired title thereto and possession thereof through its consolidation with another of the defendant companies, which had acquired its title and possession through the foreclosure of a mortgage given by the company which had made the seizure. The bill nowhere asserted a right under the Constitution or laws of the United States, but proceeded on common law rights of action. We cannot accept the suggestion that the mere order of a federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in

which the order was entered, and thereby affect the finality of decrees in the Circuit Court of Appeals in proceedings taken by him. The validity of the order of appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made.

"The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States.

"In Bausman vs. Dixon, 173 U. S., 113, we have ruled that a judgment against a receiver appointed by a Circuit Court of the United States, rendered in due course in a state court, does not per se involve the denial of the validity of an authority exercised under the United States, or of a right or immunity specially set up and claimed under a statute of the United States."

The court then gives the essential facts and part of its holding in the above case. It then continues:

"That was indeed a writ of error to a state court, but the reasoning is applicable here. Pope was appointed receiver by an in-

terlocutory order of the Circuit Court in the exercise of its general equity powers. He did not occupy the position of a receiver of a corporation created under federal law, as in Texas & Pacific Ry. vs. Cox, 145 U. S., 593; or of a marshal of the United States, as in Feibelman vs. Packard, 109 U. S., 421; or of a receiver of a national bank, as in Kennedy vs. Gibson, 8 Wall., 498. Nor did his cause of action originate or depend on the order of appointment, or assignments made to him by the Atlantic Company pursuant to that order. Nor was any right claimed by him by virtue of his order of appointment or of his deeds of assignment denied or alleged to have been denied. The decrees of the Circuit Court and of the Circuit Court of Appeals dealt solely with the alleged rights of the Atlantic Company as against certain Indiana corporations. It is impossible to hold that these orders of appointment were equivalent to laws of the United States within the meaning of the Constitution."

Pope vs. Louisville, New Albany & Chicago Ry. Co., 173 U. S., 573.

Capital Bank vs. Cadiz Bank was an action by an Ohio bank against the receiver of a Nebraska bank to recover certain moneys collected by the latter bank upon notes belonging to the former bank. It was alleged in the petition that the Nebraska bank was a national bank, that the receiver was appointed, who took possession of the bank's assets, yet no right was

specifically claimed under a law of the United States and the case was pursued to final judgment in the Supreme Court of Nebraska and no disclosure of a federal question appears in the record, save in the application to the Supreme Court for a rehearing. The receiver failed to set up that a federal question was involved, and the court refuses to take cognizance of the case.

Capital Nat'l Bank vs. Cadiz Bank, 172 U. S., 425.

Attention is called to the late case of Marrs vs. Felton et al., 102 Fed., 775, wherein Judge Evans doubts the correctness of his reasoning in Tompkins vs. McLloyd, 96 Fed., supra, and although in the same circuit refuses to follow the decisions of Judge Taft theretofore followed by him in Landis vs. Felton, 73 Fed., supra, and Gilmore vs. Herrick, 93 Fed., supra, and other cases.

The reasoning of Mr. Circuit Judge Grosscup in Gablemann vs. Peoria, etc., Ry. Co., 101 Federal, supra, so clearly and concisely states the reasons why the federal courts are without jurisdiction in cases of this character that notwithstanding the Gablemann case has been certified to this court, we submit the views of the learned judge as worthy of most careful consideration.

Judge Grosscup, page 5, says:

> "The case is not one that involves, as a necessary ingredient, inquiry into the statutes of the United States or any provision of the federal Constitution, such as was in-

volved in Osborne vs. Bank, Ry. Co. vs. Cox, and Pac. Ry. Co. of Mo. vs. Mo. Pac. Ry. Co., supra. Indeed, the case can be decided and decided rightly without looking into either the federal Constitution or the statutes. No federal law lies at the basis of the receiver's right, in this class of cases, to either sue or defend,—certainly not to defend. No federal law governs his liability in the matter complained of. The subject matter of the suit, from beginning to end,—from the question of the receiver's liability to suit, to and including the principles that shall give direction to the suit and govern the amount of damages,—is determinable solely according to general laws, or the law of the state where the injuries were committed. Nor are the appointment of the receiver itself, and the power of the court to make such appointment, traceable directly to federal law. They grow out of the law of general chancery jurisdiction, which, of course, was conferred originally upon the courts by the Constitution and laws of the United States, but they are as remote from this origin as is an action of ejectment growing out of a land patent in which the validity of the patent is not involved, or an action upon a judgment obtained in one of the United States courts. (Assurance Soc. vs. Ford, 114 U. S., 635.) The case under consideration, in no just sense, therefore, involves the validity, the scope, or the effect of any right, derived from the Constitution and laws of the United

States of federal courts to appoint this receiver and put it in possession of the property."

The learned judge, after referring to and quoting liberally from Pope vs. Ry. Co., supra, concludes as follows:

"We regard this portion of the opinion as an ex cathedra announcement against the doctrine that suits begun in state courts against receivers of federal courts are removable into the federal court upon the ground alone that the receivers are appointed under an order of the federal court. Indeed it would be anomalous—and this consideration probably moved the Supreme Court to speak—if such incidental actions against the receiver as the one now under consideration by us could be appealable of right to the Supreme Court, as it could if removable at all, while the original action to which he owed his appointment rested finally with the Circuit Court of Appeals. Maintenance of such a view of the rights of receivers would carry to the court of last resort all the driftwood of a receivership, while leaving with the Circuit Court of Appeals, except in rare instances of certiorari, direction and control of the stream."

An examination of the decisions of the Circuit Courts convinces one that many of them have so nar-

rowed and restricted the provisions of the act of congress as to make it useless and without effect in giving the relief that it is fair to assume was intended by congress in its passage.

With this fact before us and also desiring to aid the court as far as possible in its investigation of the subject under consideration, I have made an examination of the proceedings of congress. The original bill was introduced in the house at the first session of the Forty-ninth Congress by Judge Culberson of Texas, then chairman of the judiciary committee, and referred to that committee. The committee reported the bill without amendment; it was sent to the calendar and was not again referred to or called up until the 13th day of January, 1887, during the second session of the Forty-ninth Congress. On that day the bill was called up for passage and the chairman of the committee made a short explanation concerning its provisions. It was then passed without opposition.

Congressional Record, vol. 18, part 1, second session Forty-ninth Congress, page 613.

The bill is printed in full at page 613, and while it makes radical changes in the act of March 3, 1875, the amendment that we are considering was not a part of the bill when it first passed the house. After the bill passed the house, it went to the senate and was referred to the committee on the judiciary, where it was considered by the committee and reported to the senate by Senator Wilson of Iowa, with many amendments, including the one under consideration.

On the 2d of March, 1887, Senator Wilson called up the bill for passage, with the amendments, which are fully reported in the Record.

Congressional Record, vol. 18, part 3, page 2542.

The bill, with the amendments, and another amendment proposed by Senator Cullom, increasing the salary of judges, passed the senate (Record, page 2544) and went to the house.

At page 2618 of the Record, we find where Senator Wilson moved that the senate reconsider the vote increasing judges' salaries and request the house to return the bill. This motion prevailed; the bill was returned to the senate, the Cullom amendment stricken out and the bill passed by the senate as amended by the judiciary committee. The senate insisted on its amendments and asked for a conference on the disagreeing votes of the two houses.

Record, pages 2623-2624.

The bill was considered the very last day of the session and we find but little discussion of it in the Record. The object of the bill, however, is quite clearly stated by Senators Edmunds and Wilson. In discussing the Cullom amendment, Senator Wilson said:

> "I have heretofore voted for a measure similar to that presented by the senator from Illinois, but I am not prepared to vote for it to become a part of this bill. It is a very important bill in the way of relief to the United

States courts *and in giving the people of the country local jurisdiction in business affairs.* * * *"

Record, part 3, page 2544.

In discussing the same amendment, Senator Edmunds said (page 2544):

"This bill as it came from the house of representatives was altogether extreme, and the gentlemen of the committee who felt the inconvenience and wrong of subjecting *mere local affairs* to *the great expense of national jurisdiction,* diminished their desires so that the committee at last agreed upon the bill as it now stands, which is much less extreme than the one the other house proposed, and which, on the whole, if we correctly understand it, does not do any injustice to any of the people who have national interests in states where they do not live, other than carrying the right to go to the United States courts from $500 to $2,000. I thought that was going a little too far, that it had better be $1,500 or $2,000, but on the whole we came to that and left out of the bill, as the amendments now are, some house provisions which we thought to be quite too extreme.

"In this state of things, and wishing myself to diminish the wrong and inconvenience that exist in regard to what is now a national jurisdiction, I was willing to agree to this

report. It contains one or two things of small importance and of temporary operation that I should entirely disagree to if they were separate propositions, but the general benefit of the bill, if we correctly understand it, *will be greatly to the interest of the people who have merely local controversies with corporations, and so on, that ought fairly to be tried in the local tribunals just as if they were the citizens of the same state.* * * *"

Con. Record, volume 18, part 3, page 2544.

After the defeat of the amendment the bill went to conference and the conferrees agreed.

Record, volume 18, part 3, page 2651.

The conferrees upon the part of the house, in addition to their report, made a statement to the house as follows:

"The conferrees on the part of the house submit the following statement to accompany house bill 2441:

"The amendments of the senate other than those merely verbal promote the objects of the bill, which is to reduce the jurisdiction of the courts of the United States and to regulate the removal of causes from state to federal courts. The effect of the amendments is to reduce the jurisdiction of the Circuit Courts of the United States, and

the managers on the part of the house recommend that the house recede from its disagreement and agree to the senate amendment."

Record, volume 18, part 3, page 2727.

Respectfully submitted,

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